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No. 11,449

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

FLOTILL PRODUCTS, INC.,
Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF.

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Table of Authorities Cited

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RESPONDENT'S SUPPLEMENTAL BRIEF.

This brief, pursuant to this Court's order of December 15, 1949, will be limited to a discussion of the effect on the present case of the Supreme Court's decision in the *Colgate-Palmolive-Peet* case.

In respondent's brief herein we argued at length that the Board's "cease bargaining doctrine", which it applied in this case, is neither required nor permitted by the language of the law; in fact, it is contrary to law. The *Colgate* decision of the Supreme Court is in our view a logical development from the *Consolidated Edison* case discussed at pages 46 to 49 of our brief, where the Supreme Court strictly limited the Board's asserted right to invalidate contracts with independent labor organizations.

The Board in the *Colgate* case decided that there was a conflict between the rights guaranteed employees in Section 7 and the permission in Section 8 (3) to make a closed shop contract. The Board resolved the conflict by giving preference to Section 7 and disregarding the Section 8 (3) proviso.

In the Flotill case the Board found a conflict between the guarantees of Section 7 and the stability of collective bargaining relationships, which is the principal objective of the law. This objective was accomplished in the Wagner Act through protection of the right of employees to select a collective bargaining agent and by requiring employers to bargain with a majority union. The Board in our case again resolved this conflict by giving preference to the employees' "freedom of choice" (Board's reply brief, pp. 3 and 4) disregarding the policy of stability.

The proviso to Section 8 (3), subordinated by the Board in the *Colgate* case, *permitted* making a closed shop contract. The stability principle subordinated in the Flotill case is enforced by the requirements of Section 8 (5), that an employer *must* bargain with the majority union and he must reduce to writing and sign the agreement reached. *H. J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514.

The Board may no more invalidate a contract negotiated as required by Section 8 (5) than it may ignore the closed shop contract negotiated as permitted by Section 8 (3) merely because of the presumed conflict with rights guaranteed to employees by Sec-

tion 7 to change their collective bargaining representative.[1]

The employees are free to change their bargaining agent, but until they do, the closed shop contract, validly negotiated, must be observed; and, until they do, the employer must observe his obligation to bargain with the majority union with which he has bargained in the past. It should be emphasized that the Board did not allege or try to prove in this case that the A. F. of L. did not represent a majority. The Board presumed that it did not, merely because of the pendency of a petition to change the bargaining agent. The law does not so provide. If, in fact, the A. F. of L. did not represent a majority, the burden was upon the Board to allege that it did not and to prove that it did not.[2]

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[1]The Board was not prevented by the contract from holding an election. The Board could hold an election (as it did) and the employees were free to vote (as they did). The Board applies no general rule that a fair election is dependent upon the absence of a contract. The Board conducts thousands of elections while contracts are in force and while closed shop contracts are in force. One of the problems which occurs often before the Board is the question of whether or not the Board should direct an election because of the existence of a contract, and the Board has developed a complicated body of law as to when an existing contract will or will not bar an election. Despite the contract, the Board could make sure that the election would be fairly conducted, and it could prevent any unlawful interference by the employer; but the Board could not go beyond the law and prohibit as interference what the law not only does not prohibit, but requires.

[2]The employer could not object if the Board alleged and proved that it contracted with a minority union. The Board made no effort to allege or to prove that the A.F. of L. did not represent a majority. As far as the Board is concerned, it would make no difference if the A.F. of L. represented 99% of the employees. The Midwest Piping Doctrine forbids bargaining so long as the Board has not yet determined the bargaining representative desired by a

The language used by the Supreme Court in the *Colgate* case is in a large part applicable *mutatis mutando* to the present case. For convenience, the portions we consider significant are set out below, with our comment appearing in the right hand column:

Quote	Comment
1. "There is no question but that the discharges had the effect of interfering with the employees' right, given by Sec. 7 of the Act, to self-organization and to collective bargaining through representatives of their own choosing. Nor is there any question but that the discharges had the effect of discriminating, contrary to the prohibition of Sec. 8 (3), in the tenure of the employees."	In this case, there is no evidence whatsoever that the continuance of bargaining with the A.F. of L. actually interfered with employees' rights at all. The Board presumes, without evidence, that "agitation for a change in bargaining representatives" converted the continued recognition of the A.F. of L. into an unfair labor practice, because, presumably, the A.F. of L. could not represent the majority.
2. "The claimed impotency of the contract as a defense here rests not upon any provision of the Act of Congress or of state law or the terms of the contract, but upon a policy declared by the Board. That policy has for its avowed pur-	The same alleged conflict exists in this case. The Board says (brief, p. 3) that the Midwest Piping Doctrine "represents a reasonable and therefore valid, accommodation of conflicting interests to the effectuation of the basic purpose

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majority of the employees. The Board therefore makes a *Board* conclusion that the A.F. of L. represented a majority, a condition precedent to bargaining. The law requires only that the A.F. of L. *actually* represent a majority. The employer who bargains while the Board is determining the majority representative assumes the risk. If another union is certified, he must bargain with it; but the vital question is not whether the Board says the A.F. of L. has a majority, but whether or not in fact it has a majority. If it has a majority, the employer must bargain; and his contract is invalid and his recognition is invalid only if the A.F. of L. did actually represent a majority.

NOT

Quote	Comment
pose the solution of what the Board conceives to be an anomalous situation, in that Sec. 7 guarantees employees the right to select freely their representative for collective bargaining, while the proviso to Sec. 8 (3) permits a closed shop contract with inherent possibilities for invasion of the right guaranteed by Sec. 7. The solution arrived at in the Rutland Court case, and urged here, is that the Board may not give full effect to the proviso of Sec. 8 (3) because to do so would permit circumvention of Sec. 7. We turn to this contention."	and policy of the Act." The Rutland Court Doctrine, invalidated in the *Colgate* case and the Midwest Piping Doctrine, involved in this case, are both engrafted on the law by the Board because of the Board's conclusion that such additions to the law are necessary to permit employees to make a free choice of a new bargaining agent.
3. "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the Act. The Board cannot ignore the plain provisions of a valid contract made in accordance with the letter and the spirit of the statute and reform it to conform to the Board's idea of correct policy. To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress."	This language argues strongly for the respondent's position in the present case. The Board's policy may no more make an unfair labor practice out of that which is required by Sec. 8 (5) than it can make an unfair labor practice out of what is authorized by the Sec. 8 (3) proviso.

Quote	Comment
4. "It must be remembered that this is a contest primarily between labor unions for control. It is quite reasonable to suppose that Congress thought it conducive to stability of labor relations that parties be required to live up to a valid closed-shop contract made voluntarily with the recognized bargaining representative, regardless of internal disruptions growing out of agitation for a change in bargaining representative. In the instant case the employees exercised their right to choose their bargaining representative. The representative bound them to a valid contract. The contract was lived under for four years, and was subsisting at the period of time in question. It was made and carried out in good faith by petitioner who cannot be held guilty of an unfair labor practice by administrative amendment of the statute. We reject the application of the so-called Rutland Court doctrine."	In the *Colgate* case the contract was one of indefinite duration. Here, the contract provided for yearly renewals was renewed before the Board's order of February 15, 1946, and the renewal affirmed by a separate instrument after the Board's order cast doubt on the validity of the renewal. It is certainly unreasonable to suppose, as does the Board, that there can be no collective bargaining representative while the Board is resolving an "internal disruption growing out of agitation for a change in bargaining representative". The stability of labor relations achieved by the collective bargaining contract is even more necessary during such a period of disruption. The Board may not hold petitioner guilty of an unfair practice for doing what the law contemplated and required. The Board's decision so holding was, as in the *Colgate* case, an "administrative amendment of the statute".

SUMMARY.

In its decision of February 15, 1946, the Board stated (Record 58) that its decision meant "the employees will have no bargaining representative to ne-

gotiate an exclusive collective bargaining agreement to cover the coming season, until a new election can be held which may result in one of the rival unions being certified. The current A. F. of L. contract will expire on March 1, and since the legal effect of the foregoing determination is to keep the question of representation pending before the Board, none of the unions is entitled to an exclusive status as a bargaining agent after that date." The Board, in its reply brief, states (p. 4) "the net effect of the Midwest Piping rule is that the Board, after weighing the competing factors in favor of the policy of stability on the other, came to the conclusion, as it did also in the *Local No. 2880* case, that the factors in favor of freedom of choice outweighed those in favor of stability in the given circumstances."

The Board, therefore, asserts the right, in its administrative discretion, to read into the law that during the pendency of a request for a change in bargaining representatives, the right of employees to bargain collectively and the obligation of the employer to contract with the majority union is administratively excised from the Act. Congress has not so provided, but the Board, by administrative legislation, seeks to fill in what it considers to be an omission in the statute. The Supreme Court has clearly indicated in the *Colgate* case that such administrative legislation is forbidden the Board. It is respectfully submitted that the *Colgate* decision requires a decision that the

order herein is invalid as administrative legislation, and must be set aside.[3]

Further oral argument will be presented if desired by the Court.

Dated, Oakland, California,
January 13, 1950.

Respectfully submitted,
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JEFFERSON E. PEYSER,
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[3]The Supreme Court and this Court have held that:

"An order * * * made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made."

NLRB v. Pacific Greyhound Lines, Inc., 303 U.S. 261; *NLRB v. Oregon Worsted Company*, 94 Fed. (2d) 671; *NLRB v. Lettie Lee, Inc.*, 40 Fed. (2d) 243. Respondent realizes, therefore, that compliance with an order of the Board or other intervening circumstances may not affect the validity of the order or be raised as a defense to enforcement of the order. However, in the event that respondent's contentions herein should not be sustained and an order should be entered, respondent may desire (dependent upon the provisions of any order that may be entered) to urge that the entry of the stipulated order and decree in *NLRB v. California Processors and Growers, Inc., et al.*, No. 12344, raises serious problems concerning the obligations of respondent under any order that might be entered in this case.